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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY Cm COURT OF APPEALS, DIVISION II  
DEPUTY  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

RICHARD BUTLER,

Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable George Wood, Judge  
Cause No. 06-1-00521-9

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BRIEF OF RESPONDENT

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**A. APPELLANT’S ASSIGNMENTS OF ERROR**

1. Defendant claims that the trial court erred by admitting evidence that he had failed to register as a sex offender on four prior occasions.
2. Defendant claims that he did not receive effective assistance of counsel when his attorney failed to request an instruction informing the jury of the limited purpose for which it could use evidence of his prior convictions for failure to register as a sex offender.
3. Defendant claims that the trial court lacked statutory authority to order him to pay restitution to the Clallam County jail for the costs of medical treatment received during incarceration pending trial and sentencing.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the admission of the four prior convictions for failing to register as a sex offender affected the jury’s verdict. Assignment of Error No. 1.
2. Whether defendant’s counsel was ineffective by failing to request an instruction informing the jury of the limited purpose for which it could use the evidence of the four prior convictions for failing to register as a sex offender. Assignment of Error No. 2
3. Whether the trial court erred in requiring the defendant to pay \$832.65 to the jail for medical expenses incurred while in the Clallam County Jail. Assignment of Error No. 3

**C. STATEMENT OF THE CASE**

Pursuant to RAP 10.3(b), the State accepts defendant’s recitation of the procedural and substantive facts set forth in his opening brief at

pages 4 through 7 with a cautionary note that there appears to be numerous incorrect cites to the Report of Proceedings.

**D. ARGUMENT**

**1. THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE OF FOUR PRIOR CONVICTIONS FOR FAILING TO REGISTER AS A SEX OFFENDER.**

Evidence Rule (ER) 609 governs the admission of prior convictions of a witness. Part (a) of the rule states:

For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness, but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

*State v. Calegar*, 133 Wn.2d 718, 722, 947 P.2w 235 (1997).

The State bears the burden of proving that the probative value of the prior conviction outweighs any undue prejudice. *State v. Jones*, 101 Wn.2d 113, 121-22, 677 P.2d 131 (1984), *overruled in part on other grounds* by *State v. Ray*, 116 Wn.2d 531, 806 P.2d 1220 (1991).

Although the decision of whether to admit a prior conviction is a matter of

discretion for the trial court, the court “must bear in mind at all times that the sole purpose of impeachment evidence is to enlighten the jury with respect to the defendant’s credibility as a witness.” *State v. Calegar*, 133 Wn.2d at 723, citing *State v. Jones*, 101 Wn.2d at 118.

Before admitting a prior offense under ER 609(a)(1), the trial court is required to balance the following factors on the record: (1) the length of the defendant’s criminal record; (2) the remoteness of the prior conviction; (3) the nature of the prior crime; (4) the age and circumstances of the defendant; (5) the centrality of the credibility issue; and (6) the impeachment value of the prior conviction. *State v. Alexis*, 95 Wn.2d 15, 19, 621 P.2d 1269 (1980).

In the instant case, the State sought to admit four prior convictions for failing to register as a sex offender dating from 2001 to 2005. Supp CP 57. In determining whether or not to admit the prior convictions the trial court reasoned:

... You know, this is not the - - if Mr. Butler gets up and testifies that he was threatened in some way by individuals that are not going to testify, all we’re going to have is Mr. Butler’s testimony, then I think his credibility with regard to that is highly important and I think the State has – could have an opportunity to rebut that testimony.

And I think it is relevant that he was not – he has 4 prior convictions for not registering.

But I think the way I'm going to do it, and I think I've got to weigh the prejudicial affect versus the relevancy and so forth, and it seems to me that the cross examination can occur reasonably by the State through reference to the time periods in which he failed previously to comply with the registration requirements.

In order words, well, you make decision and – or – between July 15<sup>th</sup> and December 15<sup>th</sup> or whatever it may be, you chose not to register during that period of time, isn't that true. And I think it's – questions along those lines and I think the State can ask those for all 4 of those – for those convictions.

Now, if he wants to get up and explain why he didn't do it during those periods of time, he pled guilty to the offense, so I think at that point the State would have an oppor – would be valid in saying well, you were actually convicted of a crime, even though you've come up with some excuse you pled guilty to the crime, et cetera.

. . . if he denies – I assume he's going to say I didn't register during that period of time. But if he says no, I did register during that period of time then I think the State certainly has the right to impeach him with the convictions.

So, I think you can deal with the time periods and cross examine him with the time periods for which he received the convictions without mentioning the convictions. But should he – again, should he get up – should he get up, should he testify then that well this is the reason I didn't, I think the State then has the opportunity to say well, you pled guilty to this didn't you and you were convicted.

So it's kind of a two part form, it depends on what Mr. Butler testifies to.

Is that clear to everybody?

I think that way we've dealt with the credibility issue which I think is highly relevant here in this case without going into the fact that he's been convicted. But depending on the testimony we may get into the convictions as well.

... It would substantially outweigh, and I'm trying to balance it between the prejudice and the relevance of it, the probative value of it. It seems to me that this is the best way to do it without having "you've got 4 convictions" right off the bat being asked of him, okay. RP 11-14

On cross examination the State questioned the defendant as to whether or not he had complied with the sex offender registration requirements during the period between October 3, and October 17, 2006. The defendant admitted he did not. RP 83-84 . Further on cross examination the State questioned the defendant as to whether or not he had complied with the sex offender registration requirements during the period between 2001 and 2005. RP 93-98.

While it is apparent that the court did not discuss the factors set out in *State v. Alexis*, 95 Wn.2d at 19, and allowed the State to impeach the defendant with prior convictions, if this court does find error, the State asked the court to find that any error was harmless.

When error is claimed, the court typically determines if there is a substantial likelihood that any error affected the verdict. *State v.*

*Contreras*, 57 Wn.App. 471, 473. 788 P.2d 1114 (1990) [*quoting State v. Traweek*, 43 Wn.App. 99, 107-08, 715 P.2d 1148, *review denied* 106 Wn.2d 1007 (1986)], *disapproved on other grounds by State v. Blair*, 117 Wn.2d 479, 491, 816 P.2d 718 (1991) [*citing In re Winship*, 397 U.S. 358, 90 S.ct.1068, 25 L.Ed.2d 368 (1970)]. When error affects a separate constitutional right, it is subject to the stricter standard of constitutional harmless error. *Id.* Constitutional error is harmless only if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. *State v. Jones*, 71 Wn.App. 798, 812 863 P.2d 85 (1993), *review denied*, 124 Wn.2d 1018, 881 P.2d 254 (1994); *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), *cert denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed. 2d 321 (1986).

The evidence in the instant case was overwhelming that the defendant failed to register as a sex offender during the period between October 3 and October 17, 2006. The defendant admitted same on both direct examination, albeit it he claimed necessity, (RP 60-61) and on cross examination. RP 83-84. If there was error, it did not affect the verdict; the defendant admitted under oath that he failed to register as a sex offender during the period charged in the information. RP 60-61, 83-84. It is not within reasonable possibility that the jury would not have convicted defendant of failing to register as a sex offender when he openly admitted

failing to register under oath. Evidence of prior convictions had no bearing on the jury's verdict. Error, if there was any, was harmless and defendant's conviction should be affirmed.

**2. DEFENDANT'S COUNSEL WAS NOT INEFFECTIVE.**

An appellate court will presume the defendant was properly represented. *Strickland v. Washington*, 466 U.S. 668, 688-689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856, 113 S.Ct. 164, 121 L. Ed. 2d 112 (1992); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

A criminal defendant's must overcome this strong presumption of effectiveness of his trial counsel by proof that counsel's representation fell below an objective standard of reasonableness, i.e. that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland*, 466 U.S. at 687. Additionally, the criminal defendant must show there exists a reasonable probability that, but for defense counsel's deficient conduct, the outcome of the trial would have been different. *Strickland*, 466 U.S. at 687.

Washington courts use a two-prong test to overcome the strong presumption of effectiveness that courts apply to counsel's performance.

*State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995);  
*Hendrickson*, 129 Wn.2d at 78; *State v. Bennett*, 87 Wn. App. 73, 77, 940 P.2d 299 (1997). The defendant must meet both prongs of the test to merit relief. *Thomas*, 109 Wn.2d at 225-226; *Bennett*, 87 Wn. App at 77. A defendant must first demonstrate that defense counsel's representation was deficient. *McFarland*, 127 Wn.2d at 334-335; *Bennett*, 87 Wn. App at 77.

The test of incompetence is after considering the entire record, can it be said that the accused was not afforded effective representation and a fair and impartial trial. *State v. Johnson*, 92 Wn.2d 671, 682, 600 P.2d 1249 (1979), *cert. dismissed*, 446 U.S. 948 (1980).

For the second part, the defendant must show prejudice such that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *McFarland*, 127 Wn.2d at 334-335; *Hendrickson*, 129 Wn.2d at 78; *Bennett*, 87 Wn. App at 77.

Because trial strategies and techniques may vary among lawyers, a defense attorney's decision that constitutes a trial tactic or strategy will not support a claim of ineffective assistance of counsel. *In re Personal Restraint of Benn*, 134 Wn.2d 868, 888, 952 P.2d 116 (1998); *Johnson*, 92 Wn.2d at 682; *Hendrickson*, 129 Wn.2d at 78; *Bennett*, 87 Wn. App at 77.

A defendant is not entitled to perfect counsel, to error-free representation, or to a defense of which no lawyer would doubt the wisdom. Lawyers make mistakes; the practice of law is not a science, and it is easy to second-guess lawyers' decisions with the benefit of hindsight. Many criminal defendants in the boredom of prison life have little difficulty in recalling particular actions or omissions of their trial counsel that might have been less advantageous than an alternate course. As a general rule, the relative wisdom or lack thereof of counsel's decisions should not be open for review after conviction. Only when defense counsel's conduct cannot be explained by any tactical or strategic justification which at least some reasonably competent, fairly experienced criminal defense lawyers might agree with or find reasonably debatable, should counsel's performance be considered inadequate.

*State v. Adams*, 91 Wn.2d 86, 91, 586 P.2d 1168 (1978)

Finally, if the evidence supports a finding beyond a reasonable doubt that the defendant was guilty as charged, it cannot be asserted that his counsel was incompetent simply because the defendant was not acquitted. *Johnson*, 92 Wn.2d at 682.

In alleging ineffective assistance of counsel, the defendant bears the burden of showing there were no legitimate strategic or tactical reasons behind defense counsel's decision. *State v. Rainey*. 107 Wn.App. 129, 135-36, 28 P.3d 10 (2001), *review denied* 145 Wn.2d 1028 (2002).

Defendant's counsel did not ask for a limiting instruction as a tactical measure. There was no need for a limiting instruction regarding the credibility of the defendant based on the admission of the four prior convictions. The defendant admitted, under oath that he did not register as required during the period between October 3 and October 17, 2006; he also admitted he knew he was required to register. RP 60-61, 83-84. The defendant's credibility, under the circumstances was not an issue that required a limiting instruction. Requesting one would have drawn unnecessary attention to a matter that was clearly not in issue. Any error in not requesting the instruction was harmless under the circumstances; lack of the instruction did not affect the jury's verdict. By the defendant's own testimony, the evidence against him for failing to register as a sex offender was overwhelming. RP 60-61, 83-84. Defendant's conviction should be affirmed.

**3. THE TRIAL COURT DID NOT ERR IN REQUIRING DEFENDANT TO REIMBURSE THE CLALLAM COUNTY JAIL FOR MEDICAL EXPENSES INCURRED DURING HIS INCARCERATION.**

RCW 70.48, the City and County Jails Act specifically authorizes the court to order that the defendant pay for medical costs incurred while incarcerated. RCW 70.40.130 states in pertinent part:

The governing unit or provider may obtain reimbursement from the confined person for

the cost of health care services not provided under chapter 74.09 RCW, including reimbursement from any insurance program or from other medical benefit programs available to the confined person. Nothing in this chapter precludes civil or criminal remedies to recover the costs of medical care provided jail inmates or paid for on behalf of inmates by the governing unit. *As part of a judgment and sentence, the courts are authorized to order defendants to repay all or part of the medical costs incurred by the governing unit or provider during confinement.* (Emphasis added).

Defendant's contention that the court lacked statutory authority to order him to pay restitution to the Clallam County Jail is totally without merit and his conviction should be affirmed..

**E. CONCLUSION**

Based on the foregoing, the State respectfully asks this Court to affirm defendant's conviction for failing to register as a sex offender.

DATED this 24th day of October, 2008, at Port Angeles,  
Washington.

Respectfully submitted,



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Carol L. Case, WABA # 17052  
Deputy Prosecuting Attorney  
Attorney for Respondent

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DIVISION II

IN THE COURT OF APPEALS OF  
THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON

NO. 37653-11-1  
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STATE OF WASHINGTON,  
Respondent,

vs.

RICHARD WAYNE BUTLER,  
Appellant.

AFFIDAVIT OF SERVICE BY MAIL

( )

STATE OF WASHINGTON )  
: ss.  
County of Clallam )

The undersigned, being first duly sworn, on oath deposes and says:

That the affiant is a citizen of the United States and over the age of eighteen years; that on the 24th day of October, 2008, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope containing a copy of the *Response Brief*, addressed as follows:

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SUBSCRIBED AND SWORN TO before me this 24th day of October, 2008

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(PRINTED NAME:) Linda J. Mayberry

NOTARY PUBLIC in and for the State of Washington

Residing at Port Angeles, Washington

My commission expires: 10/30/2011

AFFIDAVIT OF SERVICE